



# STATE OF INDIANA

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Circle City Crime "3C" Podcast  
Chris Davis  
Indianapolis, IN

VIA EMAIL ONLY: [threecpod@gmail.com](mailto:threecpod@gmail.com)

**Re: Informal Opinion 19-INF-06; Investigatory Records**

Dear Mr. Davis:

This informal opinion is in response to your inquiry about whether it is appropriate for a law enforcement agency to deny a request for public records in accordance with the Access to Public Records Act's discretionary exception for investigatory records after the agency disclosed the same records to another requestor. In accordance with Indiana Code section 5-14-4-10(5), I issue the following informal opinion to your inquiry.

## BACKGROUND

You raised the following issues in your informal inquiry to this office:

Would it be appropriate for [a law enforcement agency] to deny my request using the investigatory materials exception, when they acknowledge they shared the requested information with a Board Member of a non-profit organization that, at times, works in conjunction with law enforcement, namely Crime [ ] Stoppers?

Restated, the issue you raise is whether a law enforcement agency may exercise discretion to withhold certain investigatory records under APRA if the agency has already disclosed the same records to another requestor based on that person's affiliation with the nonprofit entity Crime Stoppers.

## DISCUSSION

### 1. The Access to Public Records Act ("APRA")

The Access to Public Records Act ("APRA") expressly states that "it is the public policy of the [State of Indiana] that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." Ind. Code § 5-14-3-1. In general, APRA governs access to public records in Indiana. What is more, public records are presumptively disclosable unless an exception applies.

APRA has both mandatory and discretionary exceptions to disclosure.<sup>1</sup> Notably, Indiana Code section 5-14-3-4(a)(8) provides: “[r]ecords declared confidential by or under rules adopted by the Supreme Court of Indiana” are not “subject to disclosure unless access is required by state or federal statute or access is ordered by a court under the rules of discovery.”

Generally, unless an exception applies, public records are presumptively disclosable under APRA. Under APRA, “public record” means:

any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Ind. Code § 5-14-3-2(r). Here, the records you reference are public records for purposes of APRA.

## **2. Investigatory Records**

APRA bestows law enforcement agencies with discretion to withhold investigatory records from public disclosure. Ind. Code § 5-14-3-4(b)(1). “Investigatory records,” in this context means “information compiled in the course of the investigation of a crime.” Ind. Code § 5-14-3-2(i). In other words, “if there is no criminal investigation, the documents cannot be withheld at [the agency’s] discretion pursuant to the investigatory records exception.” *Scales v. Warrick County Sheriff’s Department*, 122 N.E.3d 866, 871 (Ind. Ct. App. 2019).

Notably, your inquiry is not whether the records at issue constitute investigatory records under APRA. Even so, the records appear to constitute investigatory records. So, this office will presume the records fall within the ambit of the exception.

## **3. Waiver**

The crux of your inquiry is whether a law enforcement agency can, consistent with APRA, selectively disclose investigatory records to another party and deny the same disclosure of the same records to you in accordance with the investigatory records exception.

Although APRA does not contain a waiver provision, our courts acknowledge that a public agency can waive the exceptions to public disclosure. *Unincorporated Operating Div. of Indiana Newspapers, Inc. v. The Trustees of Indiana University*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2003);

In *Ind. Newspapers*, the Indiana Court of Appeals rejected the argument that a public agency cannot waive the exceptions under APRA on the basis the act contains no express waiver provision. 787 N.E.2d 893 at 919. “Waiver is the voluntary and intentional relinquishment of a known right.” *Id.*

The court noted a situation where a public agency might waive the protections provided by APRA’s exceptions:

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<sup>1</sup> Ind. Code §§ 5-14-3-4(a) and (b).

If, for example, an agency allowed one party access to materials and then in turn denied another party access to the same materials based upon an exception to APRA, the agency might well be held to have waived the applicable APRA protections.

*Id.* at 919. The court further explained that its conclusion on the issue of waiver does not frustrate the purpose of APRA's exceptions, "for if the agency has already disclosed the allegedly non-disclosable materials, the purpose of the APRA exceptions will have already been compromised." *Id.*

Moreover, the court observed that "in such a case, the decision to deny access after allowing others access could be considered an arbitrary and capricious abuse of discretion. *See* I.C. § 5-14-3-9(f)(2)." Without a very compelling reason, this office does not condone picking and choosing who gets what when disclosure exceptions are waived.

In 2017, the Indiana Court of Appeals declared that "[a]n arbitrary and capricious decision is one which is patently unreasonable and is made without consideration of the facts and in total disregard of the circumstances and lacks any basis which might lead a reasonable person to the same conclusion." *Groth v. Pence*, 67 N.E.3d 1104, 1122 (Ind. Ct. App.), *transfer denied*, 86 N.E.3d 172 (Ind. 2017).

Here, based on the information provided, it is conceivable that the law enforcement agency waived the protections afforded by APRA's investigatory records exception. If the agency allowed one party access to certain investigatory records and then in turn denied you access to the exact same investigatory records, the agency likely waived the applicable protections under APRA.

The purpose of the investigatory records exception is to protect the integrity of a law enforcement agency's investigation into a crime, not to selectively boost the true crime infotainment research of one party over another.

Please do not hesitate to contact me with any questions.

Best regards,

A handwritten signature in black ink, appearing to read 'L. Britt', with a stylized flourish at the end.

Luke H. Britt  
Public Access Counselor